In The

Supreme Court of the United States

OCTOBER TERM, 1975

75-1184

No. _____, MISC.

PEGGY J. CONNOR, HENRY J. KIRKSEY, et al.,
Petitioners,

vs.

HONORABLE J. P. COLEMAN, UNITED STATES CIRCUIT JUDGE; HONORABLE DAN M. RUSSELL, JR., UNITED STATES DISTRICT JUDGE; HONORABLE HAROLD COX, UNITED STATES DISTRICT JUDGE, AND THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
Respondents.

BRIEF OF RESPONDENT-DEFENDANTS IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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BRIEF OF RESPONDENT-DEFENDANTS IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

Defendant state officials in this cause before the United States District Court for the Southern District of Mississippi, as respondents under United States Supreme Court Rule 31(3), respectfully submit by their attorneys, pursuant to said rule, this brief in opposition

to the motion and petition for writ of mandamus heretofore docketed with the clerk of this Court on February 19, 1976, and received by these respondents on February 20, 1976.

QUESTIONS PRESENTED

(1) Whether the District Court's injunction formulating and implementing a reapportionment plan for the 1975 legislative elections but denying the specific and extensive injunctive relief requested by petitioners, appealable under 28 U.S.C. §1253, can be reviewed by a writ of mandamus after petitioners failed to pursue their once available remedy.

(2) Whether the District Court abused its discretion in exercising its inherent power to control its docket and to time its decisions by deferring a hearing and decision on the formulation of a permanent legislative reapportionment plan for the *1979* legislative elections until this Court decides three closely related cases presently before the Court.

STATEMENT OF THE CASE

On June 5, 1975, just two and one-half weeks after the entry of the District Court's final judgment, this Court, on an application for an injunction pending appeal in *Connor* v. *Waller*, 421 U.S. 656 (1975), reversed the District Court's judgment approving the 1975 Reapportionment Plan submitted to the Court by the defendants.[1] The reversal on Section 5 grounds was, however, without prejudice to the District Court's

1. The Court did not address the merits of the plan, but reversed on the limited question of the applicability of Section 5 of the Voting Rights Act of 1965 (as amended), 42 U.S.C. §1973c.

authority to require the conduct of the legislative elections for the year 1975 under a court-ordered plan consistent with the dictates of this Court in *Mahan* v. *Howell*, 410 U.S. 315 (1973), *Connor* v. *Williams*, 404 U.S. 549 (1972), and *Chapman* v. *Meier*, 420 U.S. 1 (1975).

Immediately upon remand, the District Court allowed the United States to intervene; held extensive conferences with all counsel in regard to the mandate; required briefing by the parties; conducted evidentiary hearings; and on July 11, 1975, rendered its final injunction formulating and implementing the reapportionment plan for the 1975 legislative elections. These laborious and time-consuming tasks were performed by the District Court in the short period of thirty-six (36) days after this Court's remand decision.[2] Can it be gainsaid that the District Court acted with all deliberate speed?

On July 29, 1975, petitioners filed a motion to alter or amend the judgment. Said motion merely requested the District Court to set February 1, 1976, as a deadline for the completion of the reapportionment plan for the *1979* legislative elections. On August 1, 1975, the District Court denied the motion, expressly holding that "the Court declines to set a deadline upon its own efforts." (P.App. C) Petitioners took no action in regard to this denial.

On January 29, 1976, the District Court denied a motion filed by the *United States* on January 26, 1976,

2. After the hearings, the District Court rendered two intermediate orders prior to the July 11, 1975 injunction as the new districts were formulated, in order to give the voters and candidates of such districts as much notice as possible as to the composition of the new districts.

to establish February 10, 1976, as the date for a hearing on the plan for reapportionment for the *1979* legislative elections. By this order, the District Court deferred hearing and decision on the reapportionment plan for the *1979* legislative elections until this Court decides three pending cases: *United Jewish Organization of Williamsburgh, Inc.* v. *Wilson*, 2 Cir. 1975, 510 F.2d 512, cert. granted sub nom., *United Jewish Organization of Williamsburgh, Inc.* v. *Cary*, 44 U.S.L.W. 3279 (Nov. 11, 1975); *Beer* v. *United States*, D.C. D.C., 1974, 374 F.Supp. 363, prob. juris. noted, 419 U.S. 822, 95 S.Ct. 37, 42 L.Ed.2d 45; *Zimmer* v. *McKeithen*, 5 Cir. 1973, 485 F.2d 1297 (en banc), cert. granted sub nom., *East Carroll Parish School Board* v. *Marshall*, 1975, 422 U.S. 1055, 95 S.Ct. 2677, 45 L.Ed.2d 707.[3]

Petitioners did not join in the motion filed by the United States, nor have they to this date filed a motion requesting the District Court to alter, amend or set aside the deferral order of January 29, 1976.

Petitioners, without giving the District Court an opportunity to reconsider its deferral order of January 29, 1976, use this order as a vehicle to challenge the July 11, 1975 decree of the District Court which petitioners never sought to set aside and from which they did not appeal. Petitioners, apparently after reflection, are dissatisfied with the results of the July 11, 1975 decree and now seek to invoke the extraordinary writ of mandamus, which is nothing more than a shrouded appeal. This Court has never allowed a writ of mandamus to issue grounded upon the mere whims of petitioners.

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3. Since the entry of the deferral order, this Court has decided *East Carroll Parish School Board* v. *Marshall*, supra.

ARGUMENT

A. Petitioners Having Slept on Their Right to Appeal From the July 11, 1975 Decree of the District Court Cannot Now Correct Their Error by Resorting to the Extraordinary Writ of Mandamus.

Petitioners, having belatedly realized that they had erred in not appealing from the July 11, 1975 decree of the District Court, now seek the aid of this Court to extricate them from the judicial quagmire which they created. Their drastic plea is untimely and most improper. The real target of this motion and petition for mandamus is the July 11, 1975 decree of the District Court entered pursuant to this Court's mandate in *Connor* v. *Waller*, 421 U.S. 656 (1975), formulating and implementing a reapportionment plan for the 1975 legislative elections.

The July 11, 1975 decree of the District Court complied with this Court's mandates of *Connor* v. *Williams*, 404 U.S. 549 (1972) and *Connor* v. *Waller*, supra, although it properly denied the extensive injunctive relief requested by petitioners. The Three-Judge Court's decree was appealable under 28 U.S.C. §1253.[4] However, petitioners neglected to avail themselves of their right to appeal from this decree and now they seek to revive this extinguished right by calling upon this Court to grant a writ of mandamus, which is reserved for only the most exceptional cases where the right sought

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4. 28 U.S.C. §1253 provides: "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act Congress to be heard and determined by a district court of three judges." (June 25, 1948, c. 646, §1, 62 Stat. 928)

to be enforced is clear and certain. *Will* v. *United States*, 389 U.S. 90 (1967).

This Court has repeatedly held that the extraordinary writ of mandamus cannot be used as a substitute for appeal. *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 383 (1953); *Parr* v. *United States*, 351 U.S. 513, 520 (1956); *Will* v. *United States*, supra. A much stronger case exists against the misuse of mandamus as a substitute for an *untimely* appeal.

It is well settled that if a party has lost his remedy in due course of law through his own fault, he will not be entitled to a writ of mandamus on the ground that his remedy at law is inadequate. *United States ex rel. Connor* v. *District of Columbia*, 61 App. D.C. 288, 61 F.2d 1015 (1932); *Calf Leather Tanners Assn.* v. *Morgenthau*, 65 App. D.C. 93, 80 F.2d 536 (1935), cert. denied 297 U.S. 718 (1936). This rule has been aptly articulated in High's treatise on *Extraordinary Legal Remedies, 3rd Ed.*, §16:

> "The fact that the person aggrieved has by neglecting to pursue his statutory remedy, placed himself in such a position that he can no longer avail himself of its benefit does not remove the case from the application of the rule, and constitutes no ground for interference by mandamus."

Petitioners' drastic efforts to salvage an appeal by mandamus is not new to this Court. In *Ex Parte Riddle*, 255 U.S. 540 (1921), on a petition for a writ of mandamus, where the petitioner sought to correct the trial judge's refusal to amend the record this Court refused to issue the writ, reasoning that:

> "He might have saved the point by an exception at the trial or by a bill of exceptions to the denial

> of his subsequent motion, setting forth whatever facts or offers of proof were material and then have brought a writ of error, Nalle v. Oyster, 230 U.S. 165, 177, 57 L.Ed. 1439, 1443, 33 Sup.Ct.Rep. 1043. *In such cases, mandamus does not lie.* Ordinarily, at least it is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record. [Citations omitted]" (Emphasis added)

Also in *Ex Parte Tiffany*, 252 U.S. 32 (1920), this Court denied another similar attempt to obtain by mandamus that which might have been achieved by appeal. In denying the writ, this Court held:

> "It is well settled that where a party has the right to a writ of error or appeal, resort may not be had to the extraordinary writ of mandamus or prohibition. Ex parte Harding, 219 U.S. 363, 55 L.Ed. 252, 37 L.R.A. (N.S.) 392, 31 Sup.Ct.Rep. 324. Re Oklahoma, 220 U.S. 191, 55 L.Ed. 431, 31 Sup.Ct.Rep. 426. As the petitioner had the right of appeal to the circuit court of appeals, he could not resort to the writ of mandamus or prohibition."

As stated in the *American Law Reports Annotation*: "Right to Mandamus as Affected by Loss of Other Remedy":

> "No case has been found where in spite of culpable negligence of the applicant in his failure to avail himself of the other remedy, the writ of mandamus has been granted to compel the action he could have required by the use of the prescribed remedy." 145 A.L.R. 1044, at 1046, §IIa.

Further, the fact that petitioners' failure to appeal from the July 11, 1975 decree within the time provided by law might have been due to the ignorance of petitioners as to their right to such a remedy is not sufficient excuse to permit mandamus to issue. In *Curtis* v. *Pappas*, 5 N.J. Mis.R. 57, 135 A. 503 (1926), a state appellate court refused to grant a writ of mandamus to review the judgment of a lower court where the petitioner sought to excuse his failure to appeal on the relator's ignorance of the law respecting appeals. In denying the writ, the Court stated:

> "The petitioner has taken no action by appeal to have the judgment reviewed.
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> * * *
>
> This Court has not the power to depart from the procedure fixed by the legislature. Appeals from judgment of district courts must be made in conformity with the statutes respecting appeals. The petitioner seeks to explain his conduct in the present case by stating that he did not know the law in this respect. This is not a sufficient excuse for his failure. He is presumed to know the law."

While petitioners try to focus this Court's attention on the January 29, 1976 deferral order, clearly the basis of their challenge is the decree entered by the District Court ordering a reapportionment plan for the 1975 legislative elections. Under the clear weight of authority, petitioners' failure to appeal from that decree, whether as a result of their negligence, design or ignorance of their right of appeal, precludes them from invoking the extraordinary writ of mandamus against the United States District Court for the Southern District of Mississippi and the three Judges who have

labored diligently and expeditiously in this vineyard of reapportionment.

B. The District Court's Deferral Order of January 29, 1976, Postponing for a Limited Duration the Formulation of a 1979 Reapportionment Plan Is an Insufficient Basis to Support Mandamus.

Petitioners disguise their challenge to the July 11, 1975 decree by attacking the January 29, 1976 order entered by the District Court deferring hearing and decision on the *1979* legislative reapportionment plan until this Court decides the three closely related cases presently before this Court.

While mandamus in exceptional cases may be an appropriate remedy to require a federal court to proceed with and determine a suit, the deferment of a hearing and determination is within the discretion of the trial court, and this discretion generally will not be interfered with by mandamus. *Ex Parte Wagner*, 249 U.S. 465 (1919). In the instant case, where the "prospective relief," temporarily delayed, is incapable of becoming operative until a period of time more than three years hence, mandamus cannot be justified. The mandate of *Connor* v. *Waller*, 421 U.S. 656 (1975) directed toward the 1975 legislative elections has been complied with by the District Court's decree of July 11, 1975, with no appeal being taken therefrom. All that remains now is for the District Court to formulate a reapportionment plan for the *1979* legislative elections. Petitioners erroneously perceive the office of mandamus. Even in the exceptional cases where the writ is invoked, it has not been used to establish rights. *Ex Parte Wagner*, supra. With the next legislative elections more than three years away; with reapportionment

legislation pending in the Mississippi Legislature; and more importantly—and the judicial basis of the deferment—with this Court's decision to review three very closely related cases, a situation is presented that not only warrants a temporary delay but demands such.

Petitioners apparently having awakened to the fact that they slumbered on their right to appeal from the July, 1975 decree, rush to this Court with this thinly veiled challenge to that decree, asserting that they are at loggerheads with the deferral order. Yet they did not even stop to go to the District Court to ask that the order be rescinded.

The questions before this Court in *Beer* v. *United States*, 419 U.S. 822 (1974), noting prob. juris. of 374 F.Supp. 363 (D.D.C. 1974) (three-judge court); *East Carroll Parish School Board* v. *Marshall*, 422 U.S. 1055 (1975), granting cert. to *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5 Cir. 1973) (en banc); and *United Jewish Organization of Williamsburgh* v. *Carey*, 44 U.S. L.W. 3279 (No. 75-104) (U.S. Nov. 11, 1975), granting cert. to *United Jewish Organization of Williamsburgh* v. *Wilson*, 510 F.2d 512 (2d Cir. 1975) are closely related to the issues before the District Court in the instant case. In these three cases, the questions concerning dilution of black voting strength and maximization of black voting strength have been presented to this Court. Petitioners' claims of dilution of black voting strength, although not properly raised in the District Court until April 15, 1975, with petitioners' filing of their Amended Compiaint, pervade this entire controversy. Thus the District Court's decision to await the "badly needed guidance" from this Court in these cases is the better part of judicial husbandry, and com-

ports with rather than contravenes this Court's policy and practice of reversing and remanding a cause for reconsideration in light of this Court's decisions rendered subsequent to the lower court's decision being reviewed.

C. Petitioners' Deliberate Efforts to Frustrate the District Court's Compliance With This Court's Mandate in Connor v. Williams, 404 U.S. 549 (1972) Speak So Loud Their Assertions of Delay Cannot Be Heard.

Petitioners paint a picture of excessive and unjustified delays in this cause and complain that these delays have resulted in a denial to petitioners of the relief to which they are entitled. In painting this distorted scene, petitioners neglect to advise this Court of their persistent and continuous efforts following this Court's decision in *Connor* v. *Williams*, 404 U.S. 549 (1972), to enlarge the scope of this litigation from a consideration of only the "large multi-member districts" of Hinds, Harrison and Jackson Counties to a reconsideration of the entire statewide plan.

In *Connor* v. *Williams*, supra, this Court told the District Court and the parties to wind up the proceedings with respect to the feasibility of creating single-member districts in Hinds, Harrison and Jackson Counties so that the entire 1971 state plan could be reviewed. Four (4) days prior to the April 20, 1973 date set for the show-cause hearing,[5] petitioners filed a

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5. Petitioners erroneously state at page 16 of their petition that "no explanation was ever issued from the Court for its failure to hold the scheduled hearing." Counsel for the parties were advised by the Clerk of the District Court upon telephone inquiry to a member of the Court that the April 20, 1973 date was actually a deadline for the filing of petitioners' objections.

motion for continuance, setting forth that they needed additional time to prepare a statewide single-member district plan. While the posture of the case at that time concerned only the redistricting of Hinds, Harrison and Jackson Counties,[6] petitioners revealed their intentions by their Motion for Continuance to prolong this litigation by rehashing the entire state plan. Continuing their efforts to enlarge the scope of this litigation, petitioners on April 26, 1974, moved for leave to file a supplemental complaint, again making a challenge to the entire state plan instead of only Hinds, Harrison and Jackson Counties. Throughout the year 1974, petitioners prepared their case challenging the statewide plan through depositions, upon oral examinations, upon written questions and through request for admissions of fact and genuineness of documents.[7] It is difficult to understand how petitioners can seriously complain of delays when petitioners' actions and efforts resulted in delays and when it is quite apparent that at least at those times petitioners were not properly prepared to present their case in the manner they desired.

Petitioners radically assert that the District Court has not complied with the mandates of this Court. Apparently petitioners make this drastic allegation because they realize that only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of the remedy of mandamus against a

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6. The January 4, 1973 order deferring the appointment of a special master referred to the legislature for resolution the questions and issues concerning Hinds, Harrison and Jackson Counties only.

7. See docket entries listed on Appendix G of petitioners' petition, page 55a at pp. 76a-79a.

lower federal court. *Will* v. *United States*, 389 U.S. 90 (1967). Once before in 1971 in this case petitioners came to this Court on an application for stay with an erroneous precinct map, and obtained the stay.[8] Now petitioners come before this Court on motion and petition for mandamus with seriously erroneous assertions. The mandates of *Connor* v. *Williams*, 404 U.S. 549 (1972) and *Connor* v. *Waller*, 421 U.S. 656 (1975), while frustrated by petitioners, were clearly followed by the District Court in formulating, in the face of pending legislative elections, a statewide reapportionment plan, which plan created for the House of Representatives fifty-six (56) single-member districts, twenty-one (21) districts having no more than two representatives, four (4) districts with three and three (3) districts with four representatives. Said plan created for the Senate twenty-seven single-member districts, eleven districts with only two senators and only one district with three senators.[9]

It is apparent from the history of this litigation, as set out above, that petitioners are not concerned with the speed of this litigation but rather with the direction. Mandamus in certain exceptional circumstances may be the proper remedy to require a court to act, but this is not the end that petitioners seek by this petition. When shed of its judicial garment it is beyond cavil that petitioners are not concerned

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8. Two days after this Court entered its stay in *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971), the District Court convened to carry out the directions of this Court. At that hearing, petitioners conceded that the precinct map on which they presented their claims to this Court was erroneous. See *Connor* v. *Johnson*, 330 F.Supp. 521, 522 (S.D. Miss. 1971).

9. This computation includes floterial districts.

with the District Court not acting but with the actions taken by the District Court in entering the July 11, 1975 decree formulating and implementing the *1975* legislative reapportionment plan. Petitioners, finding the front door of this Court closed because of their failure to avail themselves of their appellate rights, are now trying to enter through the emergency door. This Court should not create an exception in the law of mandamus merely to accommodate those who have bypassed, deliberately or otherwise, the proper judicial procedures.

CONCLUSION

The entry of the January 29, 1976 Order by the District Court deferring the hearing and decision on the formulation of a reapportionment plan for the 1979 legislative elections until this Court decides three closely related cases was a proper exercise of sound judicial discretion and this Court should not permit these petitioners to use this deferral order as a vehicle to challenge by mandamus that which they failed to challenge by appeal.

Respectfully submitted,

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